

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 1, 2004 Session

RONNIE SHANE ASHLEY v. TRACY LYNN JONES, ET AL.

**Appeal from the Chancery Court for Rutherford County
No. 98DR-82 J. S. Daniel, Judge**

No. M2003-02411-COA-R3-CV - Filed August 24, 2005

The trial court ordered a divorced father to pay his former wife \$124 a week in child support in accordance with the child support guidelines. After the father was laid off from his job, he asked the Department of Human Services to lower his child support obligation because of reduced income. Acting under Tenn. Code Ann. § 36-5-103(f), the agency cut the father's obligation in half without prior notification to the mother. She filed a complaint in Chancery Court, arguing that the Department had taken away her property right without due process and in reliance upon a statute and administrative rules that violated the separation of powers under the Tennessee Constitution. The trial court dismissed her complaint. We reverse the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Reversed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN, and FRANK G. CLEMENT, JR., JJ., joined.

M. Keith Siskin, Murfreesboro, Tennessee, for the appellant, Tracy Lynn Jones.

Paul G. Summers, Attorney General and Reporter; Warren A. Jasper, Assistant Attorney General, for the appellee, Ronnie Shane Ashley.

OPINION

I.

Tracy Lynn Jones and Ronnie Shane Ashley were married in the year 1990. They subsequently became the parents of a child, Leigha Marie Ashley, born in 1993. The parties were divorced in 1998 by a decree of the Chancery Court of Rutherford County. The divorce decree and the parenting plan incorporated into it declared that the parties' daughter would reside with the mother and that the father would pay child support by wage assignment of \$93.72 per week "in accordance with the child support guidelines."

In 2002, a petition was filed by the Department of Human Services on behalf of the mother, Tracy Lynn Jones, asking the court to increase amount of child support, because of “a significant variance between the Tennessee Child Support Guidelines and the amount of child support currently ordered.” The petition was resolved by an agreed order of modification, filed on August 27, 2002, which increased the father’s obligation to \$124 per week.

On January 21, 2003, the father filed a petition in the chancery court to modify the parenting plan and asked to be named the child’s primary caretaker in place of the mother. He alleged that the mother had violated the parenting plan in several respects which, for purposes of this appeal, we need not discuss. On the same date, the father applied to the Department of Human Services for a reduction in his child support obligation.

The Department sent him a form “Affidavit of Income and Expenses.” He completed the affidavit, indicating that he had been laid off from his job and that unemployment benefits now constituted his sole source of income. After he returned the affidavit, the Department issued an “Administrative Order for Modification of Current Support,” reducing his obligation to \$60.23 per week. The mother was not provided with prior notification of the father’s application. Neither did she received the administrative order immediately.

The mother did not receive any support during the next three and a half weeks. When a check finally came, it was for only \$60. She phoned the Department to ask why the amount was so small, and she was told that she would receive a letter explaining that the support had been reduced because the father had become unemployed. The letter arrived three days later, accompanied by a copy of the administrative order. The administrative order that appears in the record states it was mailed February 7, 2003, but also states it was entered by the supervisor on February 8, 2003.

Both documents described procedures for filing an appeal of the administrative order. The mother went to the Department’s local office and asked the case worker on duty about the appeals process. According to the mother, the worker told her she could appeal if she wished, but that there was nothing the Department could do, because the father was drawing unemployment compensation and was “no longer working for that employer.” The mother accordingly decided not to appeal. The mother also told the worker that she had not gotten notice of the father’s request and the Department’s decision until after her support had stopped and then been reduced.

Subsequently, the mother filed an Answer and a Counter-Petition in response to the Father’s Petition to Modify Custody. The Answer denied the father’s allegations as to the mother’s conduct and stated that the father himself had himself violated the parenting plan. The Counter-Petition also asked the trial court to vacate the Department’s reduction in the father’s child support obligation.

In support of this request, the mother contended that reducing her child support without notice violated her procedural due process rights. She also argued that by modifying a valid court order, the Department had encroached on powers reserved to the judiciary in violation of the constitutional provision mandating separation of powers. Since the constitutionality of a statute was

at issue, a copy of the Answer and Counter-Petition was served on the Tennessee Attorney General pursuant to Tenn. Code Ann. § 29-14-107(b). The Attorney General subsequently filed a Petition to Intervene, which was granted.

After a hearing on the father's Petition for Modification of Custody, the court transferred custody of Leigha Marie from the mother to the father on June 13, 2003. The father's obligation to pay child support was accordingly terminated. The mother had no income at the time, so she was not ordered to pay child support.

A separate hearing on the mother's Counter-Petition was conducted on August 13, 2003. Two witnesses were called, the mother and Whitney Dotson, the supervisor of the Rutherford County District Attorney's Child Support Division, who had signed the administrative order of modification at issue. Both witnesses testified as to the circumstances surrounding the administrative reduction of child support.

The mother also testified that the sudden elimination and then reduction of child support caused financial hardship for her and her child. She had trouble paying her utilities bill and providing for her child. She testified that the support payments were irregular, in that she initially got a check for \$60, and later would get no check some weeks, but receive \$180 at a time sometimes. She also testified that she talked to her former husband who told her he had begun working again and was unemployed for only three weeks.¹ She contacted the Department,² and ultimately the original amount of support was reinstated. The administrative order modifying support back to the original amount, \$135.54 per week, was dated April 29, 2003. The mother testified she received the reduced amount for three months.

When asked whether she thought it would have made a difference if she had received a request for modification from the court, she answered yes. She stated that if she had notice, she could have planned and prepared for the reduction in support instead of it happening before she had any idea about it.

The child support supervisor testified that if an obligor provides proof of reduced income, the Department issues an administrative order reducing support to the appropriate amount under the child support guidelines. The notice is then sent to both the obligor and the obligee. The supervisor testified that this is the first notice the obligee receives. Additionally, she testified that a new wage

¹ Apparently the father was reinstated to his former employment with the same employer. Consequently, the wage assignment reducing the amount of support went to the same employer. Thus, when he back to work, the deduction for support was made at the lower amount, which was presumably based on his unemployment compensation. This raises the question of whether wage assignment notice is appropriate when someone is unemployed.

² DHS records confirm this contact by the mother. DHS contacted the father who confirmed that he was re-employed. DHS sent him another affidavit of income which he completed and returned, resulting in the upward modification. In his answer to the mother's counter petition, the father stated he had resumed paying the full amount immediately upon his rehire. The father did not testify at trial.

assignment for the modified amount of support is issued “as soon as the ordered information is entered into our computer system.”

When asked whether it was possible for a parent to have support reduced by an administrative order immediately, she replied probably not. Although acknowledging that it was possible, she stated that mailing and processing time by the employer generally meant there was no actual reduction until after the administrative order with notice of appeal rights was received by the obligee parent.³

She also testified that if the mother in this case had requested an appeal, the Department would have stopped the modification. “We would have just stopped the modification until the appeal issue was addressed.” When asked what would happen if a party appealed an administrative order after the wage assignment had already become effective, the supervisor stated, “Then we would do - - we do the very best that we can, and we would have done whatever was necessary.” When asked to clarify, she stated her office would have changed the information in its computer and mailed a new wage assignment with the amount due before modification to halt the effectiveness of the modification pending the appeal.⁴ She also stated they had not been doing administrative modifications very often.

At the conclusion of proof and argument, the trial court dismissed the mother’s counter-petition, holding that, although it had concerns about the constitutionality of the procedure, it need not address the constitutional issues because the mother had not filed an administrative appeal. The court held she could have stopped the reduction pending appeal and therefore had no basis to assert that she lost any rights. This appeal followed.

II. CHILD SUPPORT PROCEDURES

Child support in divorce cases has long been within the jurisdiction of the states, and is usually ordered by a state trial court after a hearing at which both parties have the right to appear and to be heard. The court’s authority is based upon the need to enforce the common law obligation of parents to support their own children. *Smith v. Gore*, 728 S.W.2d 738, 752 (Tenn. 1987) The statutory basis of the court’s authority to order support is found at Tenn. Code Ann. § 36-5-101(a). That statute also provides for judicial modification of existing orders of support, and declares that “the order or decree [is] to remain in the court’s control. . . .” Tenn. Code Ann. § 36-5-101(a)(1)(A).

³The supervisor also testified that some modifications are done through court instead of administratively. She made it clear that it was the Department’s decision as to which method to use and that administrative modifications were preferred. However, she was somewhat uncomfortable with them since her office had not done many.

⁴The supervisor also stated that the employees or the Department have no control over the mailing out of the wage assignments; that is done automatically as the information is entered in the computer.

Concerned about the effectiveness of child support enforcement, the United States Congress has adopted legislation that affects the way in which the states determine and enforce child support obligations through the Child Support Enforcement Act, 42 U.S.C. § 651 *et seq.* (sometimes referred to as Title IV-D of the Social Security Act). Congress has made federal funding for state programs contingent upon compliance with Title IV-D. The Tennessee statutes authorizing and governing the Department's role in enforcement, review, and modification of support orders were a response to this mandate.

By federal statute, 42 U.S.C. § 666(a)(10), states are required to establish “expedited administrative procedures . . . for establishing, modifying and enforcing support obligations.” The procedures found in that section include mandated review of child support awards within a three year cycle “or such shorter cycle as the State may determine,” and administrative adjustments, where appropriate, of such awards.

In apparent response to this federal statute, the Tennessee General Assembly enacted Tenn. Code Ann. § 36-5-103(f). That statute requires automatic review every three years of child support orders subject to enforcement under Title IV-D. It also allows either parent to request the Department to administratively modify support at any time.

As discussed below, since the administrative modification at issue in this case, Tenn. Code Ann. § 36-5-103(f) has been amended in significant ways. The version in effect at the time of the administrative order modifying support that is the basis of this appeal authorized either parent to request a modification or adjustment of support from the Department. The Department was required to review such request and, if the requesting party demonstrated a “significant variance,” to “adjust the support order.” Tenn. Code Ann. § 36-5-103(f)(1)(B) (repealed effective January 1, 2005). The statute then provided, as it does now, that the review and adjustment could be conducted by the court or the Department. Tenn. Code Ann. § 36-5-103(f)(1)(C).

The statute also provided that a copy of an administrative order adjusting or modifying a child support order was to be sent to the obligor and obligee. It also provided that “if an order of support is adjusted by administrative order pursuant to this section, the obligor and obligee shall have a right to administratively appeal the adjustment by requesting an appeal as provided in part 10 of this chapter.”⁵ Tenn. Code Ann. § 36-5-103(f)(5). (repealed effective January 1, 2005). A party seeking administrative review of an administrative order modifying support must file a request for such review within fifteen days of the notice of the administrative action. Tenn. Code Ann. § 36-5-1001(c)(1).⁶

⁵Tennessee Code Annotation §§ 36-5-1002 *et. seq.* govern administrative review of certain actions by the Department, including modification of support orders. Hearings on such review are governed by the contested case provisions of the Tennessee Administrative Procedures Act.

⁶Review of administrative orders of support is limited to determinations of the methodology used, based on the income of the parties, and any circumstances that would allow deviations. Tenn. Code Ann. § 36-5-1002(a)(7).

Missing from this version of the statute was any requirement of notice of a request for modification to the affected party, notice of a proposed adjustment, or the opportunity to object and be heard before any modification became effective. The statute clearly did not prohibit such notice and opportunity to be heard, but did not on its face require it. It is not clear whether the procedure used in this case was the result of rules promulgated by the Department, internal policy, or something else. Whatever its source, the procedure resulted in the mother being deprived of court-ordered support without effective notice or the opportunity to be heard.

III. DUE PROCESS

The Fourteenth Amendment to the United States Constitution prohibits the states from depriving “any person of life, liberty, or property without due process of law...” Article I, Section 8 of the Tennessee Constitution similarly declares that “no man shall be . . . in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.”

The mother herein was deprived of property or a property interest, *i.e.*, the monthly payment of a court-ordered amount, by the action of the Department. The question is whether such deprivation was effected with the process that was due.

Notice and an opportunity to be heard are the minimal requirements of due process. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1949). *See also In re Riggs*, 612 S.W.2d 461, 465 (Tenn. Ct. App. 1980). The most fundamental element of due process is “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, (1965). The Department argues the mother herein received notice and could have sought an administrative review which would have provided the opportunity for a hearing. The question is whether post-deprivation notice and hearing are sufficient.

The procedures sufficient to meet the requirements of due process may vary widely. “Due process is a flexible concept that calls for such procedural protections as the particular situation demands.” *Keisling v. Keisling*, 92 S.W.3d 374, 377-378 (Tenn. 2002). *See also Mathews v. Eldridge*, 424 U.S. 319 (1976); *Wilson v. Wilson*, 984 S.W.2d 898, 902 (Tenn. 1998); *Case v. Shelby County Civil Service Merit Bd.*, 98 S.W.3d 167 (Tenn. Ct. App. 2002);

In determining the level of procedural protection required by a particular situation, the courts have set out three factors that should be considered:

(1) the private interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Keisling, 92 S.W.3d at 377-378; *see also Mathews v. Eldridge*, 424 U.S. at 335.

The private interest at stake in the present case is the timely provision of child support for the benefit of the minor child. Obviously, furnishing adequate support for children whose welfare may be dependent upon such support is an enormously important private interest. The impact of the loss of support in the present case may be gauged by the mother's testimony that without the expected amount of support, she was unable to pay her utility bills and was threatened with having her electricity shut off. She subsequently filed for bankruptcy.

The risk of an erroneous deprivation of this interest by the Department's reliance on the procedures used in this case is substantial. Since the Department only considered the father's income affidavit in its decision, there was no opportunity for the mother to question the accuracy of the affidavit or to raise the possibility that the father was voluntary unemployed or underemployed, in which case modification of child support would be inappropriate. Tenn. Comp. Rules & Regs., ch. 1240-2-4-.03(3)(d). *See also Brooks v. Brooks*, 992 S.W.2d 403 (Tenn. 1999). In other situations, reliance on only the requesting party's information without giving the other party the opportunity to challenge it could lead to erroneous decisions to modify.

The Department argues that if it had filed a modification petition on behalf of the father in court or if the mother had administratively appealed, the result of any hearing would have been the same: the father's support would have been reduced. We do not agree that hindsight is the way to measure the risk of erroneous deprivation without the opportunity to be heard. We also do not agree with the factual premise. According to the record before us, the father was unemployed for a short time, as little as three weeks. Had the Department sought judicial modification, it is likely that by the time of the hearing, the father would have been re-employed. The mother would not have been deprived of three months of full support as she testified she was as a result of the procedure used herein.

Finally, we do not doubt that the government has an important fiscal and organizational interest in meeting the requirements of Title IV-D by substituting a streamlined administrative procedure for more lengthy and expensive judicial proceedings. The Department has not argued that its interest outweighs that of a recipient facing a reduction in support. It also does not argue that a procedure requiring pre-decision and pre-deprivation notice would burden it to the detriment of any interest it might have. Such an argument would be difficult to sustain in view of recent statutory amendments that require such notice before an administrative modification order becomes effective. Tenn. Code Ann. § 36-5-103(f)(4) and (5) (effective January 1, 2005).

No one could seriously doubt that a petition for modification of child support could not be granted by a court without notice to the other party, the opportunity to contest the modification, and a hearing. We conclude an administrative agency cannot unilaterally reduce a child support recipient's support without, at least, pre-deprivation notice and the opportunity to be heard without violating the due process provisions of both the United States and the Tennessee Constitutions.

The Department argues that the mother herein did receive notice of the administrative order modifying the amount of support, but it must acknowledge that the notice was received after the mother's support was reduced. The Department also argues that the notice provided the mother with instructions on how to administratively appeal the order of modification. The notice did give the time limit and other procedural details.⁷ It did not, however, provide any information regarding a stay of effectiveness of the administrative order or how an objection to lack of pre-effectiveness notice could be addressed.

The Department asserts that if the mother had "simply followed instructions and timely requested an appeal, she would have received a 'pre-deprivation' hearing, as the administrative action would have been stayed pending hearing." In support of this statement, the Department cites no statute or regulation. Instead, it relies on the testimony of the child support supervisor. However, she only testified that her office would do its best to stop a modification if an administrative appeal were requested. She was not clear on exactly how or whether that could be done and did not address how any reductions that had taken effect could be made up.

The Department further asserts that had the mother sought administrative review, she would have gotten a full hearing and "any modification order would not take effect." Again, the only authority cited for this statement is the testimony of the child support supervisor. Further, the statement disregards the fact that the administrative order reducing the support had already taken effect in this case. The Department characterizes the situation herein as a wage assignment prematurely taking effect "by some 'happstance.'"

Finally, the Department asserts that decisions resulting from administrative appeals are subject to judicial review pursuant to the Tennessee Administrative Procedures Act and, pursuant to a provision of that Act, "No modification goes into effect until appeals are resolved." The provision cited, Tenn. Code Ann. § 4-5-322(c), does not support that statement. To the contrary, under that provision, an agency decision is not automatically stayed during judicial review, but a stay may be requested.

As a result of the procedure used by the Department, the mother was deprived of her court ordered child support in violation of her constitutionally protected right to due process. Consequently, the administrative order modifying support should have been voided.

IV. STATUTORY AMENDMENT

The statute at issue has been amended, effective January 1, 2005. 2004 Tenn. Pub. Acts, ch. 728. Under the amended statutory procedure, where a parent seeks a modification of an existing support order:

⁷The notice also provided that the only grounds for appeal were: a mistake in identity, a mistake of fact, a determination of the appropriate application of the methods of adjustment of the order of support . . . based on the income of the parties and based upon any circumstances which should permit deviation from the amount"

1. The Department will review the request and, if cause for modification is shown, “shall seek an adjustment to the support order.”⁸ Tenn. Code Ann. § 36-5-103(f)(1)(B).

2. The review and adjustment may be conducted by the court or by the Department by issuance of an administrative order. Tenn. Code Ann. § 36-5-103(f)(1)(C).

3. The Department must give written notice to the obligor and the obligee that a review has been initiated and also of the review findings. Tenn. Code Ann. § 36-5-103(f)(4) and (5).

4. If the Department elects to seek adjustment of the support order by issuance of an administrative order instead of by judicial order, notice of the proposed administrative order modifying support shall be sent to the obligor and the obligee thirty days prior to the issuance of the administrative order. Tenn. Code Ann. § 36-5-103(f)(5).

5. The proposed administrative modification is subject to objection by the obligor or the obligee within thirty days of its mailing. An objecting parent may file a motion for a hearing on the proposed modification with the court having jurisdiction. If such a motion is filed, no further administrative appeal to the Department is available. Tenn. Code Ann. § 36-5-103(f)(6).

6. If neither the obligor nor the obligee objects to the proposed administrative modification within the thirty days of the notice of proposed modification, the Department will issue the administrative order modifying the support. Tenn. Code Ann. § 36-5-103(f)(7). In that situation, the obligor and obligee have the right to administratively appeal the modification and may request a stay of the administrative order pending that appeal. A party dissatisfied with the result of the administrative appeal may seek judicial review under specific statutory procedures. Tenn. Code Ann. § 36-5-103(f)(9).

As these procedural provisions make clear, no modification of a child support order, increasing or decreasing it, can become effective until there is notice to the affected parent of the proposed modification and an opportunity to contest the proposed modification. Additionally, a party objecting to a proposed modification can proceed directly to court, so that any modification is the result of court order, after hearing, rather than administrative action. Alternatively, a party may choose to first pursue an administrative appeal, and judicial review under a limited scope of review is still available.

The changes ensure pre-deprivation due process. They also address issues raised by administrative agency modification of court orders by ensuring affected parties may choose court review, instead of administrative review, before any modification becomes effective.

⁸This language replaced “shall adjust the support.”

V. CONSTITUTIONAL CHALLENGE

The mother contends that Tenn. Code Ann. § 36-5-103(f) is unconstitutional because it violates the separation of powers between the executive branch of government and the judiciary, as set out in Article II, Sections 1 and 2 of the Tennessee Constitution. The trial court declined to rule on the constitutional challenge.⁹ Because we have found that the mother suffered a deprivation of property without due process, it is not necessary that we decide the constitutional challenge.

It has long been the rule in Tennessee that our courts should not decide constitutional issues unless absolutely necessary to determine the rights of the parties. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995); *Haynes v. Pigeon Forge*, 883 S.W.2d 619, 620 (Tenn. Ct. App. 1994); *Bah v. Bah*, 668 S.W.2d 663, 668 (Tenn. Ct. App. 1983).

We have decided this case solely on the ground that this mother suffered denial of procedural due process. Regardless of what position we might take with regard to the question of separation of powers, it will not affect the outcome of this appeal. In any case, since Tenn. Code Ann. § 36-5-103(f) has been amended in a way that amplifies and clarifies the role of the judiciary in administrative proceedings for the modification of child support, any pronouncements we might be inclined to make about the previous version of the statute would have little practical value.¹⁰

⁹Where a party brings a facial challenge to the constitutional validity of a statute, there is no requirement that the party first seek a ruling on that issue from the administrative body charged with applying or enforcing the legislation. *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 456 (Tenn. 1995). That is because administrative officials and bodies do not have the authority to declare a statute or ordinance unconstitutional. *Id.* at 452. “The facial constitutionality of a statute may not be determined by an administrative tribunal in an administrative proceeding.” *Id.* at 454. *See also City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531, 537 (Tenn. 2004). The trial court did not find that the mother failed to exhaust her administrative remedies. Instead, it found that she could not complain of any injury since she could have avoided injury by seeking an administrative appeal. We have concluded the mother suffered an injury by the reduction in support before she received notice. We also found the proof lacking that the modification would likely have been stayed pending administrative review.

¹⁰In this appeal, the mother filed a Motion to Consider Post-Judgment Facts, which was granted by this court. Among the facts submitted was a recent revision to the internal rules of the Tennessee Department of Human Services for dealing with arrearages when modifying child support awards. While the new rule urges its local offices to exercise caution when changing the amount of court-ordered support payments, it then goes on to say,

However, if the court ordered payment towards an arrearage does not seem reasonable, and an examination of the court record does not reveal any information explaining the reason for the small payment, the local IV-D staff may administratively adjust the payment regardless of how recently the court ordered this amount.

While we have serious concerns about the validity of the rule, it was not applied to the mother in this case, and it is not before us.

VI.

The judgment of the trial court is reversed. The administrative order modifying support is declared void. We remand this case to the Chancery Court of Rutherford County to determine the appropriate amount to compensate the mother for the temporary loss of court-ordered support. The costs on appeal are taxed to the Attorney General and Reporter.

PATRICIA J. COTTRELL, JUDGE